No. 78-875

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

BLAKE CONSTRUCTION CO., INC., *Petitioner*

v.

ALLIANCE PLUMBING AND HEATING CO., INC.

and

BOHN HEAT TRANSFER DIVISION, GULF AND WESTERN MANUFACTURING COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES W. SYMINGTON
JOHN J. MULLENHOLZ
JAMES J. HICKEY, JR.
Counsel for Respondent

Of Counsel:

SMATHERS, SYMINGTON & HERLONG
1700 K Street, N.W., Suite 400
Washington, D.C. 20006

January 15, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

TABLE OF CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-875

BLAKE CONSTRUCTION CO., INC., *Petitioner*

v.

ALLIANCE PLUMBING AND HEATING CO., INC.

and

BOHN HEAT TRANSFER DIVISION, GULF AND WESTERN MANUFACTURING COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent, Bohn Heat Transfer Division, Gulf and Western Manufacturing Company, respectfully prays that the petition for a writ of certiorari to review the Opinion and Order of the District of Columbia Court of Appeals entered in this proceeding on July 3, 1978 be denied.

QUESTIONS PRESENTED

May a trial judge dismiss a counterclaim by a prime contractor for failure to present during six days of jury trial evidence that it had suffered cognizable damages, after denying an opposed motion made by the prime contractor on the sixth day to amend the counterclaim in order to implead the building owner, a separate legal entity, which had allegedly suffered the damages?

May the exercise of discretion under Rule 15 of the Rules of Civil Procedure for the Superior Court of the District of Columbia in response to an opposed motion to amend a counterclaim during the sixth day of jury trial embrace consideration of, among other factors including prejudice to the other parties, whether the movant would be willing to retry the action without a jury?

RESTATEMENT OF THE CASE

Blake Construction Co., Inc. (hereinafter "Blake") entered into a contract in 1968 with BGW Limited Partnership (hereinafter "BGW") to construct a building at Vermont Avenue & K Street, N.W. in Washington, D.C. On April 14, 1969, Blake contracted with Alliance Plumbing & Heating Company, Inc. (hereinafter "Alliance")* as the mechanical sub-contractor, to install the plumbing, heating, ventilating, and air conditioning systems in the building. Alliance in turn contracted with Bohn Aluminum & Brass

* Counsel for Alliance has advised Bohn that because of financial constraints, Alliance has determined not to file an opposition to this petition and has requested that this Court be advised that this decision should not be construed as an acknowledgement by Alliance that Blake's petition is considered to be persuasive regarding the issues sought to be reviewed.

Corp.[1] (hereinafter "Bohn") to provide an air-handling unit [2] for each floor of the building.

The specifications for the Blake/Alliance contract provided that each of ten identical units was to produce 18,675 cubic feet of air per minute by using a 10 horsepower motor turning at not more than 800 revolutions per minute to overcome external static pressure of one-half inch.[3]

Bohn submitted shop drawings to Alliance which specified that it would use 22¾ inch diameter fans but did not specify the discharge arrangement, e.g., left, right or vertical, for air from the fan sections.[4] Alliance sent these drawings to Blake, which approved them and sent them on to its mechanical engineer. The mechanical engineer also approved the drawings and returned them to Alliance. The discharge arrangement was, at this point, still unspecified.[5] When the drawings returned to Alliance there was inserted into the blank space the figure "4", which signified a horizontal discharge arrangement.[6] The shop drawings were dis-

[1] Bohn is now the Bohn Heat Transfer Division of Gulf & Western Manufacturing Company, Respondent.

[2] An air handling unit is a large machine containing a fan section and a coil section which circulates hot and cold air throughout one floor of the building. The fan section controls the flow of air and the coil section controls the temperature of the air.

[3] App. E at 16. (References to Appendices A through E are to Petitioner's Appendices.)

[4] App. E at 16.

[5] The drawings actually contained an empty block in which the discharge arrangement was to be inserted.

[6] App. E at 17. The drawings revealed that the horizontal discharge arrangement was not available for the 22¾ inch fan.

patched to Bohn where 19½ inch fans were substituted because the 22¾ inch fan was not available in a horizontal discharge arrangement.

On December 28, 1973, Alliance filed suit against Blake for monies due and owing under the contract. Blake counterclaimed for breach of contract, alleging that improper size fans had been installed in the air-handling units. Blake claimed damages of $150,000,[7] increased to $250,000 just prior to trial. Alliance then impleaded Bohn as a third-party defendant on the counterclaim.

In its answer to the counterclaim, Bohn denied any liability stating that it had supplied all materials in accordance with the specifications and requirements supplied to Bohn by Alliance.

Trial commenced on March 25, 1977, more than three years after the complaint was filed. On the sixth day of the trial, after Blake had rested and Alliance had presented its defense to the counterclaim and rested, the Court questioned whether Blake had proved that it suffered any damages.

Alliance and Bohn moved that the counterclaim of Blake be dismissed. The basis for the motion was two-fold: First, that there was no evidence before the jury to show that Blake as a party had sustained any damages;[8] and second, that based upon a lack of credible evidence concerning the cost of replacing the air-handling units Bohn and Alliance were entitled to judgment as a matter of law.[9]

[7] Blake stated in answer to an interrogatory that the building owner had withheld $250,000 from Blake due to the air-handling defects.

[8] Tr. 127 to 130.

At this point Blake first admitted through counsel that it had received full compensation under the contract with the owner of the building and simultaneously claimed an ownership interest in the building.[10] Neither Alliance nor Bohn had been apprised previously of BGW's payment in full.[11] Blake argued, however, that it could be liable to the owner should the owner bring suit.

Blake moved to amend its counterclaim to implead BGW as the real party in interest and to reopen its case in order that the partners could testify as to their damages.[12] Blake did not argue that it had shown it was damaged. The trial judge noted that including the owner of the building in the action would not simply involve a substitution of parties.[13] Blake and the owner were two separate legal entities.

The court noted that the partnership would be forced to assert a claim against Blake which Blake would then assert against Alliance and which Alliance would

[9] Tr. 138. The trial judge had indicated that Blake's evidence regarding damages was "of such an unfirm quality that, as a matter of law," the court might not consider it a fair and reasonable estimate. Tr. 126. Because the judge dismissed the counterclaim he never made a decision regarding the sufficiency of the evidence presented by Blake as to the amount of the alleged damages although he was "on the verge" of ruling that the evidence was insufficient as a matter of law. Tr. 138-139.

[10] No evidence has ever been presented concerning Blake's payment or its alleged ownership interest in the building.

[11] Tr. 136.

[12] Tr. 134.

[13] Tr. 134-135.

then assert against Bohn.[14] The court requested counsel for Bohn and Alliance to explain the prejudice, if any, which would result from allowing amendment of the counterclaim at that time and both parties explained that costs, inconvenience and other difficulties presented by the amendment and the necessity for a new trial would cause undue hardship and prejudice to each of them.[15]

The trial judge asked Blake if it would agree to a retrial without a jury so that much of the testimony and evidence already presented could stand and the expense and inconvenience to Alliance and Bohn be mitigated.[16] Blake refused to do so. The trial judge then found that Blake had presented no evidence to show that it had suffered damages, was not the real party in interest, and ordered the counterclaim dismissed.[17]

On appeal the dismissal was affirmed by the District of Columbia Court of Appeals, which noted that a trial court has wide discretion under Rule 15(a) of the Rules of Civil Procedure for the Superior Court of the District of Columbia (hereinafter "D.C. Rules") to grant or refuse amendments to the pleadings.[18] The Court of Appeals concluded that the trial court did not abuse its discretion in denying Blake's motion, noting that there was substantial time prior to trial for Blake to amend its pleadings properly and recognizing the

[14] Tr. 134.

[15] Tr. 135, Tr. 139, Tr. 143.

[16] Tr. 137-138.

[17] Tr. 145

[18] App. A at 5.

additional burden to Alliance and Blake if the motion had been granted.[19]

The Court of Appeals stated that the record did not reflect any coercion by the trial judge with respect to Blake's right to a jury trial. In finding that the trial court acted within its discretion in denying Blake's motion, the Court of Appeals refused to consider the question of the denial of a constitutional right to a jury.[20]

ARGUMENT

I. THE TRIAL COURT WAS CORRECT (1) IN DENYING BLAKE LEAVE TO AMEND ITS COUNTERCLAIM AND (2) IN DISMISSING THE COUNTERCLAIM

As is set forth in the Restatement of the Case, the trial judge dismissed the counterclaim because Blake had suffered no cognizable damage. Blake did not present any evidence during the trial to show it had suffered any injury. BGW, the owner of the building, had not made any claim against Blake, filed any suit against Blake, or obtained any judgment against Blake. All funds due Blake were paid. Nor did Blake present any evidence that it owned the building in question or had an ownership interest in the building.

When Alliance and Bohn moved to dismiss the counterclaim for Blake's failure to prove that it had sustained any damages, Blake moved for leave to amend its counterclaim in order to bring in BGW, the owner of the building and to reopen its case so that the owner could testify as to its damages. This remedy was suggested by Blake itself.[21]

[19] App. A at 6.

[20] App. A at 6.

[21] Tr. 134.

In a complete reversal, Blake now argues that it was in fact the "real party in interest" under D.C. Rule 17(a) because it was a party to the contract, an argument not raised in either court below and thus not properly before this Court. Moreover, Blake's motion to amend its counterclaim in order to bring the real party in interest, BGW, before the trial court belies its present argument.

The question thus presented is whether or not the lower court correctly denied Blake's motion to amend its counterclaim in order to bring in additional parties who had suffered damages since if Blake could not amend its pleading, dismissal was inevitable.

Under D.C. Rule 15, a party may amend its pleadings after a responsive pleading has been served only by leave of the court or by written consent of the adverse party. The trial court has wide discretion to grant or refuse such amendment. See, e.g., *Autocomp, Inc.* v. *Publishing Computer Service, Inc.*, 331 A.2d 338 (D.C. Ct. App., 1975); *Saddler* v. *Safeway Stores, Inc.*, 227 A.2d 394 (D.C. Ct. App., 1967); *Capitol Car Sales, Ltd.* v. *Nellessen*, 217 A.2d 115 (D.C. Ct. App., 1966); *Zackery* v. *Mutual Security Savings & Loan Ass'n.*, 206 A.2d 580 (D.C. Ct. App., 1963).

The trial court must consider all factors in deciding whether or not to permit a party to amend its counterclaim. Blake maintains that the court abused its discretion in denying its motion under the circumstances of this case.[22] A review of the circumstances existing

[22] Blake suggests that the denial of its leave to amend, if upheld, will allow Respondents, "admittedly" in breach of the contract requirements, to avoid a claim leaving another to bear the loss. This question, however, is irrelevant to this appeal, as is the perceived injustice Blake alleges it will suffer if the Court of Appeals decision remains standing. *Ross* v. *Moffitt*, 417 U.S. 600, 617 (1974). The sole question involved here is whether the trial court abused its discretion in denying the amendment and dismissing the suit. Blake speaks as if Bohn's liability were an established fact. Bohn, however, did not have an opportunity to present its arguments regarding liability. Had it done so, Bohn would have shown that the units it sold Alliance met the required specifications, were capable of performing the task required and that any deficiency was the result of improper installation of the equipment and improper construction of the building.

when Blake moved to amend is necessary for a full understanding of the court's refusal to grant Blake's motion. The motion was made on the sixth day of trial, after the jury had rendered a verdict on a portion of the action, more than three years after the complaint was filed, and after more than twelve hundred pages of deposition testimony had been taken. Both Alliance and Bohn[23] had already suffered significant expenses in preparing for the trial and in bringing witnesses to the trial, including an expert witness.

Had the court granted Blake's motion, new parties would have been brought before the court and new issues raised, requiring further discovery.[24] As the

[23] Bohn is located in Danville, Illinois as were the majority of its witnesses.

[24] Additional time would have been required for the filing of answers to the amended counterclaim, additional discovery would have become necessary, and additional witnesses would have had to be subpoenaed and deposed.

For example, after the complaint was filed, BGW paid Blake $250,000 pursuant to the contract despite the alleged defects in the building and its right to withhold funds under the contract. Discovery would be required regarding the relationship between BGW and Blake, the amount Blake paid for its interest in BGW, and to examine relevant documents. (*footnote continued on page 10.*)

lower court noted, BGW would have been required to make claims against Blake which Blake would assert against Alliance which Alliance would then assert against Bohn. It was thus necessary to end the existing trial. The amendment proposed by Blake involved more than a mere substitution of parties [25] or ratification of the complaint, as Petitioner suggests. Blake and BGW were separate legal entities, which both had sought to keep separate.

In addition, had the trial judge granted Blake's motion and declared a mistrial, Blake would have gained a great advantage. The trial court was greatly concerned over the adequacy of the evidence Blake presented with respect to the amount of damage to the building.[26] A second trial would have permitted Blake to bolster this evidence to the great prejudice of Alliance and Bohn.

Finally, prior to the sixth day of trial Blake never sought to amend its pleadings in order to bring BGW before the court, even though it alone was aware that it had been paid in full by BGW and therefore had suffered no damages.

Leave to amend is not granted automatically under D.C. Rule 15(a), but only where justice requires.

Another question that begs discovery is why BGW would pay Blake, the principal contractor, the full amount due it under the contract, knowing that a suit had been filed alleging defects in the building.

Answers to each of these questions would have been of critical importance to the jury in this action.

[25] Tr. 134-135.

[26] Supra, note 9.

This Court has previously ruled that a court may properly refuse to allow an amendment to a pleading where it is evident that the proposed amendment was accompanied by "undue delay, bad faith, or dilatory motive on the part of the movant . . . [or] undue prejudice to the opposing party." *Foman* v. *Davis*, 371 U.S. 178, 182 (1962).

Given the amount of time in which the counterclaim could have been properly amended, the prejudice Respondents would have suffered were the motion granted, the absence of any explanation by Blake for its failure to amend earlier, and the fact that Blake presented no evidence that it was an injured party, the trial court did not abuse its discretion in denying the motion and dismissing the counterclaim.

Petitioner attempts at this late date to argue that it was the "real party in interest" under D.C. Rule 17 (a). Bohn will address this question although this argument was not made to either court below and therefore is not appropriately before this Court on appeal. *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973); *Shadwick* v. *City of Tampa*, 407 U.S. 345, 351 (1972): *Addickes* v. *S.H. Kress and Company*, 398 U.S. 144, 147 n2 (1970).

Petitioner's invocation of D.C. Rule 17(a) is based on the assertion that it was a party to the contract with Alliance. This rule, however, cannot create claims where none exist. A party must suffer damage or loss in order to have a cognizable claim. BGW may have made a claim against Blake. Blake may have eventually been compelled to pay amounts to BGW. But until Blake has paid such amounts or suffered a similar loss, it has no actionable right or interest that is enforce-

able in court. A threat of possible loss or a possible claim cannot be considered an injury suffered or an actionable right to damages. *Grafe-Weeks Corporation* v. *Air Products, Incorporated,* 32 F.R.D. 211 (W.D. PA. 1963).

Petitioner also suggests that under D.C. Rule 17(a) the court was required to provide a reasonable time to implead BGW. Petitioner misreads this provision.

D.C. Rule 17(a) is identical to Rule 17(a) of the Federal Rules of Civil Procedure. This provision is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. *Hobbs* v. *Police Jury of Morehouse Parish,* 49 F.R.D. 176, 180 (W.D.La. 1970). Neither of these requirements is met in this case.

II. THERE WAS NO DENIAL OF THE RIGHT TO TRIAL BY JURY

Petitioner, in attempting to invoke the United States Constitution before this Court, has framed an issue which did not exist in the trial court and which the appellate court properly brushed aside in striking at the heart of the matter. While the spectre of denial of a trial by jury is being raised, in truth the trial court did not condition its decision on the motion to amend on a waiver of trial by jury.[27] It simply denied the motion.[28] The court specifically stated that it had not concluded that it would grant a mistrial, but stated "if I do go that route, I'll accept your representation."[29] The trial court also noted that the assent of all the parties would be required if the case was to be retried without a jury.[30] Thus, Blake is attempting to elevate itself into a constitutional argument based upon a circumstance which did not in fact occur, since the lower court neither granted the motion to amend nor ordered a new trial without a jury.

[27] The trial court was speaking in terms of dismissal or mistrial at this juncture, it being understood by all parties that the court had determined that if the action was not dismissed, it could only go forward through the granting of a mistrial and the amendment of the pleadings.

[28] The court properly noted that the *parties,* not merely the Petitioner would be required to waive the right to a jury on retrial.

However, assuming *arguendo* that the trial court had conditioned its decision on Blake's agreement, or not, to a non-jury trial, there would have been no error.

Blake did not have an absolute right to amend its counterclaim after it had closed its case. Its plight was the result of its own doing and there was a total failure on the part of Blake to show any extenuating circumstances. Both Bohn and Alliance demonstrated prejudice to the court.[31] Thus, the lower court was required to exercise its discretion in determining whether to allow Blake to amend.

As noted by the appellate court the trial court had the right to impose such conditions as it deemed necessary in order to avoid whatever prejudice might result from Blake's amendment and to cure to the extent possible any other unfavorable circumstances which the amendment would create.[32]

In particular, the courts have frequently discussed the right of the trial court to condition an amendment

[29] Tr. 140.

[30] Tr. 140.

[31] Supra, note 24 and text at page 6.

[32] App. A at 5.

under Rule 15(a) on waiver by the movant of a trial by jury. See *Hostrop* v. *Board of Junior College, District # 515,* 523 F.2d 569, 581 (7th Cir. 1975). In *Parissi* v. *Foley,* 203 F.2d 454, 455 (2nd Cir. 1953), the court approved the imposition of waiver of trial by jury in exchange for granting a motion to amend. An enlightening discussion of the issue is found in *Local 783 Allied Industrial Workers* v. *General Electric Co.,* 471 F.2d 751, 755-756 (6th Cir. 1973).

Hostrop and *Local 783, supra* and the cases cited in each of those decisions, stand for the proposition that if the trial court in the exercise of its discretion determines that it would be improper to permit an amendment under Rule 15(a) due to the adverse circumstances which the amendment would create, it may permit the amendment under conditions designed to cure the adversities.

The trial court's reasoning in this case was that the amendment proposed by Blake came at such a late stage in the proceedings that it would require a new trial and would be seriously detrimental to the rights of Bohn and Alliance. Therefore, the court correctly *considered,* as one possible means of overcoming the harm to Bohn and Alliance, retrial of the matter on a non-jury basis so that all of the testimony previously taken could be submitted to the judge assigned to try the case.[33] The appellate court approved the lower court's approach to the problem.

[33] The question as to whether Bohn and Alliance would have agreed to a retrial of the case without a jury, had the court granted the amendment on that basis, did not arise. However, once a jury has been demanded D.C. Rule 38(d) provides that a demand for a trial by jury may not be withdrawn without the consent of the parties. Since Blake did not seek to withdraw its demand for a jury, Bohn's consent was never at issue.

It is difficult to determine precisely what the Petitioner is arguing as error by the appellate court. Petitioner does not disagree with the proposition that a trial court may condition an amendment of pleadings on the waiver of trial by jury. Petitioner does not contend that the appellate court did not consider all of the facts and circumstances in applying that principle to the instant case. Rather, Petitioner attempts to distinguish the cases cited by the appellate court and yet overlooks one clear distinction between those cases and this one, namely that the trial courts specifically conditioned amendment of the pleadings on waiver of trial by jury. Here, however, the court did nothing more than *consider* the possibility that a non-jury trial could avoid the obvious problems created by Blake. The appellate court properly noted that the amendment was occasioned entirely by Blake's dereliction and that Blake gave no reason whatsoever to excuse the failure to amend prior to trial.

Thus, while Petitioner discusses *Parissi* and *Local 783, supra,* at length, it fails to demonstrate any error by the appellate court which also considered those cases before making its decision. In short, Petitioner is repeating the arguments that it made to the appellate court and is asking this Court to substitute its analysis of the facts and circumstances for that of the trial court.[34] Petitioner has long since exhausted its remedies on that score and is now attempting to raise an issue which should not be considered in this forum.

[34] While Petitioner appears to argue that the motion to amend should be reconsidered in a vacuum by this Court, it must be noted that the trial court had the benefit of participating in almost forty months of pretrial manuvers and discussions with counsel which led to the formulation of the pretrial order and the conduct of the trial prior to the motion to amend.

Finally, Petitioner is beseeching this Court to review an issue which the appellate court only raised by way of dicta. The court of appeals in this instance did not rely on *Parissi* and *Local 783* in reaching its ultimate conclusion, but only noted that Blake's constitutional argument, while of a specious nature, was refuted by those cases.

III. THE COURT SHOULD NOT REVIEW THIS CASE BECAUSE IT DOES NOT PRESENT QUESTIONS APPROPRIATE FOR REVIEW

Rule 19 of the Revised Rules of the Supreme Court of the United States embodies the criteria by which the Court determines whether a particular case merits review. Granting certiorari is a wholly discretionary matter and a writ will be granted where there are "special and important reasons" for doing so. *Fay* v. *Noia,* 372 U.S. 391 (1963); *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955). No such reasons exist in this action. The decision does not involve a federal question of consequence. Nor does it conflict with decisions of this Court or other appellate courts. It was a correct exercise of the lower court's authority.

A. The Case Involves an Appropriate Exercise of the Lower Court's Discretion Under Local Rules

This case concerns a trial judge's denial of a motion to amend a counterclaim. The reasons for and circumstances surrounding that decision have been set forth in detail above. Both D.C. Rule 15(a) and the case law thereunder make it clear that a trial judge has wide discretion to grant or refuse amendments to pleadings.[35]

[35] See cases cited at page 8.

This Court has been reluctant to review, much less reverse, a trial judge's exercise of discretion in connection with amendments of pleadings except for a clear abuse. *Royal Insurance Company* v. *Miller,* 199 U.S. 353, 369 (1905); *U.S.* v. *Lehigh Valley Railway Company,* 220 U.S. 257, 271 (1910); *Sawyer* v. *Piper,* 189 U.S. 154 (1902).

There has been no showing by Petitioner that the trial court abused its discretion in denying the motion to amend the counterclaim. As the D.C. Court of Appeals held, there was ample justification to refuse Blake's motion to amend.

Petitioner also argues that the trial court attempted to "condition" granting of the motion to amend the counterclaim on Blake's waiving jury trial. The record does not reflect any coercion. Whether Blake would waive its request for a jury trial was simply one of many considerations, including the opposition of Respondents, the court reviewed in denying the motion to amend.

Even if the court had conditioned the amendment on the waiver of the jury trial, this would have been within the lower court's discretion.[36]

In the instant case, the court acted well within its discretion in denying Petitioner's request for leave to amend the counterclaim. Its exercise of that discretion was absolutely correct and should not be reviewed by this Court.

Moreover, the lower decision involves only the local rules of the District of Columbia. It is applicable solely to actions brought within the local courts of the Dis-

[36] See pages 13-14 supra, and cases cited therein.

trict of Columbia. This Court has a long standing practice of not reversing decisions of the District of Columbia courts on local matters except in exceptional situations where egregious errors have been committed. *Pernell* v. *Southhall Realty,* 416 U.S. 363, 369 (1974).

A discretionary decision made under rules applicable only to the local courts in the District of Columbia and affecting only such courts is not an appropriate case for this Court to review.

B. The First Question Suggested by Petitioner Is Unique and Involves Only the Particular Litigants

The first question suggested by Petitioner involves a determination important only to the litigants in this action. It encompasses a factual pattern of very limited scope upon which the trial judge determined that one party could not recover.

This Court does not sit for the benefit of particular litigants and will only review cases involving principles, the settlement of which is important to the public not merely the parties. *Rice,* supra at 74; *Layne and Bowler Corp.* v. *Western Well Works Inc.,* 261 U.S. 387, 393 (1923). Nor will this Court review decisions which turn solely upon an analysis of the particular facts involved. *U.S.* v. *Johnston,* 268 U.S. 220, 227 (1925).

C. The Jury Trial Question Suggested by Petitioner Was Not Reviewed by the Appellate Court and Should Not Be Reviewed by This Court

The second question suggested by Petitioner is an attempt to cloak the lower court's decision with substance in order to attract the attention of this Court.

Petitioner suggests that it was "coerced" into giving up its right to a jury trial in exchange for the amendment. In fact, this is not what occurred in the lower court. Blake does not cite any evidence indicating that the trial judge "conditioned" the granting of leave to amend on Blake's agreement to waive its right to a jury trial. Certainly the trial judge considered this as one of several factors. All of the court's considerations were within the discretion authorized it under D.C. Rule 15(a).

On appeal, the court refused to even consider this constitutional question, noting that the record did not reflect any coercion. In fact there was none.

In addition, the D.C. Court of Appeals found that there was ample justification to refuse Blake's motion to amend its counterclaim irrespective of the question of whether there was a denial of the constitutional right to a jury. It has been a long standing policy of this Court to avoid constitutional questions where the matter can be resolved under another theory. *Pernell,* supra. at 365; *Rice,* supra. at 74.

Inasmuch as the initial decision in this case was based upon several factors each involving ample justification for the judge's discretionary action, this Court should follow its practice of avoiding constitutional questions where possible and deny review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

JAMES W. SYMINGTON
JOHN J. MULLENHOLZ
JAMES J. HICKEY, JR.

Counsel for Respondent

Of Counsel:

SMATHERS, SYMINGTON & HERLONG
1700 K Street, N.W., Suite 400
Washington, D.C. 20006

January 15, 1979